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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

VERA PAVLICKA,

Petitioner,

v.

NEW YORK UNIVERSITY MEDICAL CENTER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your respondent, a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York, and The United States of America, respectfully submits this brief in opposition to the granting of the petition for a Writ of Certiorari.

Statement

The petitioner was a patient in the hospital of the respondent, having entered said hospital on August 15, 1968 for a re-fusion of the lumbo-sacral area. A prior attempt

at a fusion of this latter area had failed. Surgery was performed on August 20, 1968 and, as part of her post-operative treatment, physiotherapy was prescribed. On September 13, 1968, the petitoiner, as part of the aforementioned therapy, was taken to the physical rehabilitation department of the hospital and placed on a stretcher and lowered into what is known as a "Hubbard Tank", which is a type of whirlpool bath.

The petitioner alleged that, while being lifted from the bath by mechanical sling (still lying supine on the stretcher) she was struck on her head behind her right ear causing her various and sundry injuries.

The petitioner claimed the incident occurred because one of the two attendants whom she had observed operating the "Hubbard Tank" apparatus on previous visits was absent at the time she was being lifted from said tank and, as a result of this absence, she was struck by the "control box".

The trial before the Hon. John M. Canella and jury commenced on November 8, 1973 and finished on November 14, 1973. The jury rendered a unanimous verdict for the defendant.

Questions Presented for Review

The respondent agrees with the questions as stated by the petitioner.

POINT I

The petition for a Writ of Certiorari should be denied.

Rule 19:1 (b) of this Court upon which, apparently the petitioner relies need not be quoted but it states, in substance, that this Court may consider situations as follows:

(1) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

(2) Has decided an important state question in a way in conflict with applicable state law.

(3) Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

I respectfully direct this Court's attention to Point II of the petitioner's brief in which he states in substance, that the Second Circuit Court, New York, failed to follow the New York rule. Within this argument he has advanced cases which he feels attacks both subdivisions (1) and (2) stated supra. First, he cites several New York cases to support his contention that a New York Court may not charge on contributory negligence unless evidence of such negligence has been adduced on trial. There is no quarrel with this premise. However, if such a charge is given an exception must be taken by the offended party. In his Point I which advances the argument that the trial judge had no basis for charging on contributory negligence he cites the case of *Bern* v. *Evans* (C.A. Neb. 1965). 349 F. 2d 282.

In the *Bern* case, cited supra the court states as follows at p. 288:

> "It is clear therefore, that this objection is precluded from our consideration by virtue of Rule 51, F.R.Civ. P., which provides, inter alia, as follows:
>
> 'No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.'

"We have previously held this rule to have the force and effect of law. See: *Baltimore & O.R.Co.* v. *Felgenhauer,* 8 Cir., 168 F. 2d 12; 18; and *Mills Owners Mut. Fire Ins. Co.* v. *Kelly et al.,* 8 Cir., 151 Fed. 2d 763, 765. Also see: *Miller et al.* v. *Brazel,* 10 Cir., 300 Fed. 2d 283, 288; and *Barron & Holtzoff, Federal Practice and Procedure* Vol. 2B, Sections 1101 to 1106, inclusive, p. 439 et seq."

The same case, pps. 288, 289 discusses contributory negligence and notes that the plaintiff had excepted to the instructions on such an issue, thus allowing the appellate court to consider such instructions.

The giving or not giving of an instruction to a jury will not be reviewed without seasonable objections. A party may not stand by without objection to rulings on request to charges or instructions to the jury and then, after verdict and/or judgment, when it is too late for the district court to change or correct its rulings or instructions, complain for the first time on appeal that the district court has committed error. *Federal Mut. Implement and Hardware Ins. Co.* v. *Fairfax Equipment Co.,* (C.A. Okl. 1958) 261 F. 2d 207; *Miller* v. *Brazel,* cited supra; *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Word,* (C.C.A. Tex. 1942) 131 F. 2d 541. See also *Barney* v. *Staten Island Rapid Transit Ry. Co.,* (C.A.N.J. 1963), 316 F. 2d 38, cert. den'd 84 S.Ct. 67, 375 U.S. 826, 11 L.Ed. 2d 58. This rule that no party may claim error in the giving or failing to give an instruction unless he objects thereto before the jury retires for deliberation of its verdict should be scrupulously complied with. See *Conner* v. *U.S.* (C.A. Tex. 1971), 439 F. 2d 974, op. sup. 442 F. 2d 1349.

The appellate court of appeals charged the jury in the instant case on the law of contributory negligence (Appdx 551-554) remarking in the beginning of its charge that it had discussed the charge with opposing counsel on the

afternoon before at the side bar. (Appdx 537-538). No exceptions to such charge were taken by the plaintiff's counsel. (Appdx 565). Thus the charge of contributory negligence becomes the law of the case.

The petitioner (see Point II of his brief) cites the following cases:

(a) *Meyer* v. *Brown-Harter Cadillac,* 32 A.D. 2d 1045 (2d Dep't. 1969)

(b) *Wills* v. *YMCA of Amsterdam,* 28 N.Y. 2d 375; 321 N.Y.S. 2d 895 (1971)

(c) *Izzillio as adm. etc.* v. *Tailored Woman, Inc.,* 37 A.D. 2d 839; 326 N.Y.S. 2d 160 (2nd Dep't., 1971)

(d) *Parisi* v. *Lombardi,* 41 A.D. 2d 560; 339 N.Y.S. 2d 965 (2nd Dep't., 1973)

These cases are used to support his argument that New York law, in effect, stands for the principle that it is error to charge contributory negligence when none exists.

In (a) the *Meyer* case, cited supra, the court denied plaintiffs' request to charge that there was "no evidence in this case upon which a finding could be made that Jane Kranzler Meyer was contributorily negligent". Thus this latter case is not within the area of the petitioner's case where neither an exception nor a request to charge on contributory negligence was made.

In (b) the *Willis* case, cited supra, supports the fact that the court was in error to charge the jury on contributory negligence when there was no evidence to support it. But, again the plaintiff's counsel had requested a charge that the infant plaintiff was not negligent and it was refused by the court.

In (c) the *Izzillio* case, cited supra, I see no reason for its citation as the decision therein has nothing to do with the issues raised by the petitioner.

In (d) the *Paresi* case, cited supra, again contributory negligence was charged over the objection of plaintiffs' counsel and this was held to be error.

No quarrel can be had with the three cited cases (a, b, & d, supra) of the petitioner but the defendant must respectfully point out that either proper exceptions were taken or requests were made and the lower courts acted to the contrary. The federal courts have upheld this rule in the *Bern, Federal Mut. Implement and Hardware Ins. Co., Miller, Western Fire Ins. Co. of Fort Scott, Kan., Barney* and *Conner* cases, cited supra.

Thus the issue is whether the trial judge in the instant case erred in charging contributory negligence, and if the trial counsel opposed such a charge, did he take a proper exception.

In reply to these issues, the court's attention is respectfully directed to the testimony of Miss Dawn Eustis, a Physical Therapist from the defendant hospital, in which she, in response to questions of the plaintiff's trial counsel, attempted to describe the physical appearance of the "Hubbard Tank" and its operating mechanism (Appdx 190-193); the testimony of the plaintiff on cross examination (Appdx 220-226), and the re-direct examination of Dr. Yaslow (Appdx 467-470), all of which sustain the theory that contributory negligence on the plaintiff's part could be inferred. Thus the plaintiff's counsel did not take an exception to the charge of contributory negligence.

The petitioner advances the argument that this petition is proper since the Court of Appeals for the Second Circuit has adopted a position "in clear conflict with the rules of the Court of Appeals for the Tenth Circuit". Thereupon he cites two cases as his authority, first, *General Motors Corp.* v. *Walden,* 406 F. 2d 606 (1969), and *Hartman* v. *Miller Hydro Co.,* 499 F. 2d 193 (1974). Both of these cases seem to involve requests to charge or excep-

tions to charges as given. In the instant case, neither requests to charge nor exceptions to charge regarding contributory negligence were taken by either side.

The next situation is subdivision (3) and raises the question as to whether the Court of Appeals for the Second Circuit so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for this court's power of supervision.

On this latter ground, the Court's attention is directed to *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79, 79 L ed 897, 904 wherein it was stated:

> ". . . In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:
>
> > 'If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit court of appeals.' *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393; 67 L ed 712, 714; 43 S. Ct. 422."

It is respectfully contended that where conclusions of the court of appeals depend on the appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. *N.L.R.B.* v. *Pittsburgh S.S. Co.* (1951) 71 S.Ct. 453, 340 U.S. 498, 95 L. ed. 479.

In closing, the petitioner alleges that "the trial judge showed a distinct bias against the plaintiff." This state-

ment is attempted to be buttressed by excerpts from the trial record. However, petitioner's counsel was not present during the trial and, in fact, was not involved at all with either the petitioner or her trial counsel until the petitioner retained him for the processing of her appeal. Thus it is suggested that he is a poor judge of the atmosphere of the trial and the tone and tenor of the so-called "sarcasm" and "sexist" remarks of the trial judge.

The writer of this brief was the trial attorney for the defendant herein and was unaware of any animosity on the part of the judge towards either counsel and maintains that to urge such argument, the entire transcript involving five days of trial should be available instead of three short excerpts taken out of context.

The petitioner cites the case of *Krasowski* v. *Greyhound Lines, Inc.*, (C.A. Ohio, 1968), 402 F. 2d 445. A reading of this latter case discloses the appellate court's comments on the charge of the trial court at p. 447 as follows:

> " 'You have had a lot of experience in your life. You observed this driver and heard him talk. Would you figure he was gracious with these ladies or grumpy or grouchy?'
>
> "[The significance of determining whether the bus driver was 'gracious with these ladies' as opposed to being 'grumpy or grouchy' under the Court's rhetorical question would seem well calculated to prejudice at least female members of the jury]"

On the jury in the trial of the instant case, there were three women and, since the petitioner is a woman, it would seem that the alleged "sexist" remarks of the trial judge should have redounded in her favor before the jury. Thus the reasoning of the *Krasowski* case, supra, has little efficacy in the instant situation.

Wherefore, it is respectfully submitted that a writ of certiorari to the Court of Appeals in the Second Circuit be denied.

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Dated: March 5, 1975.